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No. 03-339

IN THE

Supreme Court of the United States

JOSE FRANCISCO SOSA,

Petitioner,

v.

HUMBERTO ALVAREZ MACHAIN, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION, NATIONAL FRATERNAL ORDER OF POLICE, and ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

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MOTION FOR LEAVE TO FILE BRIEF OF WASHINGTON LEGAL FOUNDATION, NATIONAL FRATERNAL ORDER OF POLICE, and ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation, the National Fraternal Order of Police, and the Allied Educational Foundation respectfully move for leave to file the attached brief as *amici curiae* in support of Petitioner. Petitioner has consented to the filing of this brief, as has the United States; their letters of consent have been lodged with the Court. Counsel for *amici* attempted to contact counsel for Respondent Humberto Alvarez-Machain by telephone for the purpose of seeking consent but was

unable to make contact, thereby necessitating the filing of this motion.

The Washington Legal Foundation ("WLF") is a nonprofit public interest law and policy center with supporters in all 50 states. While WLF engages in litigation in a wide variety of areas, it devotes a substantial portion of its resources to promoting America's national security. To that end, WLF regularly appears before this Court and other federal courts to ensure that the United States government is not deprived of the tools necessary to protect this country from those who would seek to destroy it and/or harm its citizens. *See, e.g., Demore v. Kim,* 123 S. Ct. 1708 (2003); *Padilla v. Rumsfeld,* No. 03-2235 (2d Cir., dec. pending). WLF has appeared in several cases to discuss its view that an overly expansive interpretation of the Alien Tort Statute, 28 U.S.C. § 1350, not only is inconsistent with congressional intent but also threatens to undermine American foreign policy interests. *See Al Odah v. United States,* 321 F.3d 1134 (D.C. Cir. 2003); *Doe v. Unocal Corp.,* No. 00-56603 (9th Cir., dec. pending).

The National Fraternal Order of Police is the nation's largest law enforcement labor organization, with over 310,000 members. Members of F.O.P. have a strong interest in ensuring that they not be subject to damage suits under the Alien Tort Statute when they assist federal law enforcement officials in the apprehension of those indicted for alleged violations of federal criminal law.

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in the Supreme Court on a number of occasions.

The *en banc* Ninth Circuit ruled that nonresident alien criminals who are apprehended in a foreign country pursuant to a valid indictment from a United States court may sue for money damages both the United States government and those retained by the government to assist with the apprehension. *Amici* are concerned that that ruling will undermine both law enforcement efforts and national security; in particular, they are concerned that the ruling, by allowing alien criminals to second-guess law enforcement activities authorized by the Executive Branch, will severely damage the government's ability to combat international terrorism.

For the foregoing reasons, the Washington Legal Foundation, the National Fraternal Order of Police, and the Allied Educational Foundation respectfully request that they be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

October 6, 2003

QUESTION PRESENTED

Amici curiae address only the first issue raised by the Petition:

Whether the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, is simply a grant of jurisdiction, or whether, in addition to granting jurisdiction, it provides a cause of action upon which aliens may sue for torts in violation of the law of nations or treaties of the United States.

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BRIEF OF WASHINGTON LEGAL FOUNDATION, NATIONAL FRATERNAL ORDER OF POLICE, and ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICI CURIAE*

The interests of *amici curiae* Washington Legal Foundation, National Fraternal Order of Police, and Allied Educational Foundation are set forth in the motion accompanying this brief.[1]

STATEMENT OF THE CASE

WLF hereby incorporates by reference the Statement of the Case contained in the Petition for a Writ of Certiorari.

In brief, the Ninth Circuit affirmed an award of damages against Petitioner because, at the request of officials of the United States government, he assisted in the apprehension in Mexico of a Mexican citizen who had been indicted for murder by a federal grand jury. The Ninth Circuit held that by adopting 28 U.S.C. § 1350 in 1789,[2] Congress intended to authorize a federal court to: (1) hear tort claims by aliens with respect to events occurring outside the United States; (2) ascertain the scope of customary international law at the time those events occurred; (3) determine whether the actions of those carrying out law enforcement duties at the behest of

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

[2] Variously referred to as the Alien Tort Statute ("ATS"), the Alien Tort Act, and the Alien Tort Claims Act.

American law enforcement officials violated that customary international law; and (4) award damages against those individuals if the court determines that customary international law prohibited American law enforcement officials from authorizing the actions taken.

This case arises out of the investigation into the February 1985 murder of Enrique Camarena-Salazar, an American citizen and agent of the Drug Enforcement Administration ("DEA"). Camarena was tortured and murdered in a house in Guadalajara, Mexico by members of a Mexican drug cartel. Respondent Humberto Alvarez-Machain was at the house while the torture was taking place.

In January 1990, Alvarez-Machain was indicted for the torture and murder of Camarena, and a federal court in California issued a warrant for his arrest. After informal discussions with Mexican officials failed to produce an agreement that Alvarez-Machain be detained by Mexico and turned over to American authorities, the Deputy Administrator of the DEA authorized a plan to apprehend Alvarez-Machain without the involvement of the Mexican government. Petitioner Jose Sosa (a former Mexican police official) and other Mexicans were hired to apprehend Alvarez-Machain. They did so on April 2, 1990; within 24 hours, they had placed him on a private plane and delivered him to DEA agents in El Paso, Texas. The district court found that during that 24 hour period, neither Sosa nor anyone else abused or otherwise harmed Alvarez-Machain.

Alvarez-Machain stood trial for murder in 1992. At the close of the government's case, the district court granted his motion for acquittal. In 1993, he filed this action against the

United States, Sosa, and various other individuals.[3] Among the tort claims against Sosa were claims for kidnapping and arbitrary detention. In March 1999, the district court granted summary judgment against Sosa on those claims, finding *inter alia* that those claims were actionable under the Alien Tort Statute. Pet. App. 176a-219a. After trial, the district court found in favor of Sosa and against Alvarez-Machain on other tort claims, and awarded $25,000 to Alvarez-Machain on his kidnapping and arbitrary detention claims under the ATS. *Id.* 140a-175a.

On appeal, a Ninth Circuit panel affirmed the judgment against Sosa on the ATS claims. Pet. App. 109a-139a.[4] On rehearing *en banc*, the appeals court (by a vote of 6-5) once again affirmed the judgment and issued a decision that largely mirrored the panel decision. *Id.* 1a-108a. The majority reaffirmed a prior decision, in *Hilao v. Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994), that the ATS both: (1) grants subject matter jurisdiction to the federal courts to hear claims alleging violations of customary international law; and (2) authorizes a private right of action for damages by aliens injured by such violations, at least to the extent that the defendant has violated "international norms that are specific, universal, and obligatory." *Id.* 9a-10a. The Ninth Circuit held that it was the province of the courts to determine what those universal "international norms" were, and that they need not defer to the Executive Branch's determination that an international norm is not universally accepted. *Id.* 24a-25a n.15. The appeals court went on to determine that, despite the

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[3] Only the claims against the United States and Sosa are still at issue.

[4] The panel also reinstated Alvarez-Machain's claims against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346, reversing the district court's dismissal of those claims. *Id.*

DEA's explicit authorization of his conduct and despite numerous similar instances of arrests by American law enforcement authorities in foreign countries without the consent of the local government, Sosa had violated "international norms that are specific, universal, and obligatory" by arresting Alvarez-Machain and detaining him for less than 24 hours. *Id.* 25a-44a.

In a dissent joined by three other judges, Judge O'Scannlain accepted (based on prior circuit precedent) that the ATS provided aliens with a right of action for violations of customary international law, at least in some instances. *Id.* 73a n.2. However, he argued that Alvarez-Machain was not entitled to relief because the United States does not subscribe to any "norm" that prohibits apprehension of indicted criminal suspects outside the borders of the United States, and "no claim can be actionable under the ACTA based on a norm to which the United States does not subscribe." *Id.* 73a-74a. He stated that there was "no basis in our nation's laws for this bewildering result" and warned that "the implications for our national security" are "ominous." *Id.* 73a.

In a separate dissent, Judge Gould argued that because the case implicated a matter "directly affecting the United States's relations with a foreign nation" and because "our Constitution entrusts the conduct of our nation's foreign policy to Congress and to the executive branch, this case poses a political question decidedly inappropriate for judicial review." *Id.* 97a.

REASONS FOR GRANTING THE PETITION

This case raises national security issues of exceptional importance. Over the past 20 years, three federal circuits -- the Second, Ninth, and Eleventh Circuits -- have asserted the

power to adjudicate the tort claims of aliens who allege that they have been injured as a result of alleged violations of customary international law. They have asserted this right even when the alleged violations occur outside the United States, even when Congress has never ratified the international law sought to be enforced, and even when (as here) the alleged violation consists of conduct explicitly endorsed by senior members of the Executive Branch. The sole basis for this assertion of judicial power is the ATS, a 1789 statute that was moribund for two centuries before suddenly being rediscovered by the Second Circuit in 1980.

The number of suits being filed under the ATS has increased rapidly in recent years. That increase has spawned criticism of this new ATS jurisprudence, both within the judiciary[5] and among legal commentators.[6] Indeed, the Second Circuit recognized only one month ago that uncertainty regarding the propriety of this ATS jurisprudence continues, primarily because this Court has never ruled on "the intended purpose and scope" of the ATS. *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, ___, 2003 U.S. App. LEXIS 18098 at *20-21 (2d Cir. 2003).

One cannot overestimate the threat that the Ninth Circuit's decision poses to the federal government's efforts to

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[5] *See, e.g., Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774, 798-823 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied,* 470 U.S. 1003 (1985); *id.* at 823-827 (Robb, J., concurring); *Al Odah v. United States,* 321 F.3d 1134, 1145-50 (D.C. Cir. 2003) (Randolph, J., concurring).

[6] *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position,* 110 Harv. L. Rev. 815 (1997); William R. Castro, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations,* 18 Conn. L. Rev. 467 (1986).

wage the ongoing war on terrorism. The majority claimed that it was issuing a "limited" decision that did not "speak to . . . the capacity of the Executive to detain terrorists or other fugitives under circumstances that may implicate our national security interests." Pet. App. 4a. Rather, the majority claimed, its decision dealt only with an effort to enforce the criminal laws -- an effort the appeals court contrasted with the federal government's apprehension (in Afghanistan) and detention without trial of alleged Taliban fighter Yaser Esam Hamdi. *Id.*

But as Judge O'Scannlain persuasively argues, the Ninth Circuit's decision cannot be so easily cabined. The decision applies by its terms to an effort by the Executive Branch to apprehend an indicted criminal residing in a country that either lacks a functioning government or has a government not on friendly terms with the United States. Any such effort is now subject to second-guessing in the courts when the Executive Branch proceeds under its powers to enforce the criminal laws rather than under its war powers.

Review is also warranted because the Ninth Circuit's interpretation of the ATS is so at odds with the language of that statute. Under any commonsense reading of the ATS, the statute does nothing more than to grant jurisdiction to the federal courts to hear a limited category of claims. Contrary to the Ninth Circuit's interpretation, nothing in the language or history of the ATS suggests that it was intended to authorize a private right of action for damages by aliens injured by violations of the law of nations or of a treaty of the United States. Because the ATS does not create a private right of action, Alvarez-Machain's ATS claims against Sosa should have been dismissed for failure to state a claim.

Moreover, review is also warranted to review an alternative basis for the movement to permit judicial enforcement of customary international law. Some decisions, particularly those in the Second Circuit, have not based such enforcement on a holding that the ATS creates a private right of action. Rather, they assert that customary international law is part of "the common law of the United States," and that the ATS provides jurisdiction for a right of action implied under that common law. *Filartiga v. Pena-Irala,* 630 F.2d 876, 885-87 (2d Cir. 1980). The Ninth Circuit has occasionally taken its cue from the Second Circuit on ATS issues and has repeatedly cited *Filartiga* in support of its ATS decision. Accordingly, a ruling from this Court holding no more than that there is no right of action under the ATS could have limited impact in the Ninth Circuit, given its broad interpretation of the ATS's jurisdictional grant. Even in the absence of a right of action under the ATS, the Ninth Circuit may be inclined to reach the same result by implying a right of action under federal common law. Whether customary international law can be enforced in the federal courts because it is part of the federal common law is an issue subsumed within Question 1 presented by the Petition and ought to be addressed by the Court.

I. REVIEW IS WARRANTED BECAUSE THE RULING BELOW THREATENS TO UNDERMINE OVERSEAS LAW ENFORCEMENT, INCLUDING EFFORTS TO COMBAT TERRORISM

In barring federal court suits by nonresident aliens seeking to challenge their military detention, the Court recognized that permitting such suits would effectively undermine the ability of military commanders to wage war:

> It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.

Johnson v. Eisentrager, 339 U.S. 763, 779 (1950).

Allowing ATS suits of the type permitted by the Ninth Circuit is likely to have a similar negative effect on overseas law enforcement efforts. By allowing both the United States and law enforcement officials to be haled into court and subjected to damage claims by a nonresident alien based on their overseas law enforcement activities, the Ninth Circuit could not have devised a better way to undermined those activities. The Court should grant review to determine whether Congress really had these types of suit in mind when it adopted the ATS.

Alvarez-Machain does not contest that he was lawfully indicted for a crime to which Congress unquestionably intended to give extraterritorial effect: the murder of a federal law enforcement official. Yet the result of the Ninth Circuit's ruling is to interfere significantly with the United States's ability to take into custody those criminal suspects who live in one of the many countries from which extradition is highly problematic. For example, in 1990 without the permission of the Panamanian government headed by Manuel Noriega, United States officials entered Panama, arrested Noriega on drug-related charges, and returned him to the United States for trial. *See United States v. Noriega,* 117 F.3d 1206 (11th Cir.

1997). Noriega was convicted and remains imprisoned in this country. But under the Ninth Circuit's interpretation of the ATS, the United States and others involved in his abduction and detention would be answerable to Noriega in a damages action for violation of customary international law.

Similarly, after murdering several individuals outside the CIA headquarters in Virginia in 1993, Mir Aimal Kasi fled to Pakistan and Afghanistan. In 1997, FBI agents abducted Kasi from a hotel in Pakistan and returned him to the United States for trial -- where he was sentenced to death for his crimes. *Kasi v. Angelone,* 300 F.3d 487 (4th Cir. 2002). Not only does the Ninth Circuit decision suggest that Kasi (or his estate) could sue the United States for damages for his abduction, but also that the amount of damages awarded could be huge -- someone whose allegedly illegal abduction leads to his execution is likely to have large damage claims.

The Ninth Circuit argued that its decision was "a limited one" because it only applies to enforcement of the criminal laws, not to military actions that "may implicate our national security interests." Pet. App. 4a. But as Judge O'Scannlain points out, that line is not so easily drawn. While the Ninth Circuit appears to give a pass to military commanders:

> One of the many vexing questions implicated by its opinion, but left unanswered by the majority, is what are we to make of sub-agencies within the Department of Homeland Security, as well as the Federal Bureau of Investigation ("FBI"), the Drug Enforcement Administration ("DEA"), the Bureau of Alcohol, Tobacco, and Firearms ("ATF"), and other law enforcement agents who aid and assist in the war against terrorism and efforts to protect homeland security by capturing known terrorists and criminals in foreign locales across the

> globe? Unless the majority believes that every use of transborder arrest by the Executive branch falls within "its power to detain under the war powers of Article II," *supra* at 609 [Pet. App. 4a] (quoting *Hamdi v. Rumsfeld*, 316 F.3d 450, 473 (4th Cir. 2003)) -- which is obviously not the case -- no rational observer can honestly say that our holding today "is a limited one."

Pet. App. 72a n.1.

The abduction and detention of Alvarez-Machain was approved in advance by the Deputy Administrator of the DEA. The Ninth Circuit suggested in its opinion that Alvarez-Machain *might* not have had a valid cause of action if his abduction had been approved at a higher level. But the appeals court never indicated the precise level from which approval must come before Alvarez-Machain would no longer have been permitted to recover under the ATS. Indeed, at various points the appeals court suggested that it would accept nothing less than an *explicit* grant of extraterritorial arrest powers from Congress to the precise sub-agency involved in the arrest. *See, e.g., id.* at 41a-42a.

The broad yet vague standards established by the Ninth Circuit ensure that large numbers of past and future extraterritorial arrests made under the direction of various law enforcement agencies will be challenged by means of ATS suits for damages. As Judge O'Scannlain makes clear, there is no way to cabin the Ninth Circuit's decision to ensure that none of those suits will be ones related to arrests made in connection with the war on terror. Accordingly, review is urgently needed to determine whether Congress really intended to hamstring law enforcement activities in this manner.

II. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT'S INTERPRETATION OF THE ATS IS SO AT ODDS WITH THE LANGUAGE OF THAT STATUTE

The ATS, adopted by Congress in 1789, provides, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The Ninth Circuit held that the ATS not only grants jurisdiction to the district courts, but also provides aliens with a right of action for torts "committed in violation of the law of nations or a treaty of the United States."

That interpretation is plainly at odds with the clear meaning of the ATS, which speaks explicitly in terms of granting "original jurisdiction" and says nothing about the creation of causes of action. The Court should grant review of the decision below to address that discrepancy, particularly in light of the conflict between the Ninth Circuit's decision and the opinions of several judges on the District of Columbia Circuit. *See, e.g., Tel-Oren,* 726 F.2d at 798-823 (Bork, J., concurring).[7]

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[7] In its most recent ATS decision, the Second Circuit acknowledged a conflict between the D.C. Circuit on the one hand and the Second, Ninth, and Eleventh Circuits on the other hand on the ATS right-of-action issue:

> The rejection of *Filartiga*'s understanding of the ATCA by two of the three judges on the *Tel-Oren* panel suggests that the law of the District of Columbia Circuit stands in contrast to that of our Circuit and the other Circuits that have followed our holding in *Filartiga*. *See Al Odah,* 321 F.3d at 1146 (Randolph, J., concurring) ("The meaning of § 1350

(continued...)

Essentially moribund for nearly two hundred years, *see Tel-Oren*, 726 F.2d at 812-13 & n.21 (Bork, J., concurring), the ATS was given life by the Second Circuit in *Filartiga*, a case involving claims filed in federal court by citizens of Paraguay against a Paraguayan police officer for his alleged torture of their relative. Despite concluding that the ATS is a jurisdictional statute that did not necessarily create any substantive federal rights, the Second Circuit nevertheless held that, at least where the ATS is invoked as the statutory basis for subject-matter jurisdiction, a tort claim for the violation of an established norm of customary international law (including human rights law) arises under federal law. *Filartiga*, 630 F.2d at 887. This is so, according to the Second Circuit, because customary international law is part of "the common law of the United States." *Id.* at 885-87.

Following the decision in *Filartiga,* several courts have agreed that alleged violations of international human rights law state claims for relief under federal law. *See Hilao,* 25 F.3d at 1475-76; *Abebe-Jira v. Negewo,* 72 F.3d 844, 847-48 (11th Cir. 1996). *But see Tel-Oren*, 726 F.2d 774, 775 (per curiam) (holding, without a majority rationale, that *Filartiga*- style claims are not justiciable in federal court).

However, whereas *Filartiga* viewed such claims as arising, without congressional authorization, from "the common law of the United States," *see Filartiga,* 630 F.2d at

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[7](...continued)
has been an open question in our court. But what § 1350 does not mean has been decided. In the *Tel-Oren* case both Judge Bork and Judge Robb, in their separate concurring opinions, rejected the Second Circuit's *Filartiga* decision . . . ." (internal citations omitted).

Flores, 343 F.3d at ___, 2003 U.S. App. LEXIS 18098 at *30.

887 (noting that ATS does "not . . . grant[] new rights to aliens" but provides jurisdiction over "rights already recognized" by a federal common law of international law), most other courts, including the Ninth Circuit, concluded that the ATS creates a congressionally authorized statutory right of action, the contours of which are to be determined by the courts on a case-by-case basis. *See, e.g.,* Pet. App. 10a; *Hilao,* 25 F.3d at 1474-75; *Abebe-Jira,* 72 F.3d at 848. Under these rulings, the ATS is treated as resembling other statutes that create a general right of action but leave to the courts the task of filling in the details in common-lawmaking fashion. *Cf., e.g., Nat'l Society of Professional Engineers v. United States,* 435 U.S. 679, 688 (1978) (noting that Congress "expected the courts to give shape to the [Sherman Act's] broad mandate by drawing on common-law tradition"); *Kernan v. Am. Dredging Co.,* 355 U.S. 46, 432 (1958) (noting that with the Federal Employers' Liability Act, "Congress saw fit to enact a statute of the most general term, thus leaving in large measure to the courts the duty of fashioning remedies . . . in a manner analogous to the development of tort remedies at common law.").

The differing rationales of the Ninth Circuit (in the decision below) and the Second Circuit have led to the same result, *i.e.,* to the development by the courts of a body of federal international human rights law, enforceable by private plaintiffs in suits for money damages against both government officials and private actors.[8] Both rationales, however, are fundamentally flawed and cannot withstand scrutiny.

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[8] The sources from which applicable rules are to be derived include the works of domestic and foreign jurists and commentators, international conventions, judicial decisions, and the practice of nations. *See Filartiga,* 630 F.2d at 880-81; Pet. App. 24a-25a n.15.

Contrary to the Ninth Circuit's holding that the ATS "creates a cause of action," Pet. App. 10a, the ATS is merely a jurisdictional statute that does not create any substantive rights. This is evident both from the statute's plain text and historical context.[9] While Congress *could* have enacted legislation creating a general cause of action for violations of international law, the Alien Tort Statute is assuredly not such legislation. Indeed, as this Court has observed, "it would be inconsistent with the plain and ordinary meaning of words, to call a law defining the jurisdiction of certain courts of the United States" an exercise of Congress's Article I powers to create substantive rights and liabilities. *The Propeller Genesee Chief v. Fitzhugh,* 53 U.S. (12 How.) 443, 452 (1851).

The Court consistently has refused to find substantive federal law lurking in the confines of similarly phrased jurisdictional statutes. For example, the Court rejected the argument that substantive federal law is created by § 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa, which provides (in language paralleling that of the Alien Tort Statute), "The district courts of the United States . . . shall have exclusive jurisdiction of violations of" the federal securities laws. The Court stated:

> Section 27 grants jurisdiction to the federal courts and provides for venue and service of process. It creates no cause of action of its own force and effect; it imposes no liabilities. The source of plaintiffs' rights must be found, if at all, in the substantive provisions of the [law] which they seek to enforce, not in the jurisdictional provision.

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[9] *See* U.S. Br. 16-19. By its terms, the ATS vests federal courts with "original jurisdiction" over a particular type of action; it does not purport to *create* any private cause of action.

Touche Ross & Co. v. Redington, 442 U.S. 560, 577 (1979).

Perhaps the surest indication that the ATS was intended merely to provide jurisdiction for substantive rights created elsewhere is that one year after passage of the ATS, Congress invoked its authority under Article I, Section 8, Clause 10 of the Constitution[10] to define and punish violations of the "Law of Nations." Congress defined such violations in the precise manner that had been set forth by Blackstone several decades earlier. Act of Apr. 30, 1790, ch. 9, §§ 8-13, 25-28, 1 Stat. 113-115, 117-18; *see* 4 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, 68, 72 (1769) ("the principal offence against the law of nations . . . are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of embassadors; and 3. Piracy.").[11] Adoption of the 1790 legislation would have been superfluous if the ATS itself created a cause of action to enforce the law of nations. Because the Ninth Circuit's ruling that the ATS creates a private cause of action is so at odds with the text of the ATS, the Court should grant jurisdiction to consider the issue.

The Court should *also* include within the scope of its review whether customary international law is part of the

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[10] The Constitution grants Congress the power to "define and punish . . . Offences against the Law of Nations." U.S. Const., art. I, § 8, cl. 10.

[11] The 1790 legislation's focus on protecting the rights of ambassadors in consistent with the views of historians who suggest that the primary purpose behind the ATS was ensuring that the rights of ambassadors were enforceable in federal courts. *See, e.g.,* William R. Castro, *The Federal Courts' Jurisdiction over Torts Committed in Violation of the Law of Nations,* 18 Conn. L. Rev. 467, 490-94 (1986). Castro suggests that the Founders were concerned about the rights of ambassadors in light of two high-profile assaults on ambassadors in the 1780s. *Id.*

common law of the United States, and whether the ATS provides jurisdiction for a right of action implied under that common law. As noted above, the Second Circuit in *Filartiga* employed that alternative theory for authorizing suits to enforce customary international law in the federal courts. *Filartiga* held that the scope of the this common law right continues to expand as the modern understanding of customary international law continues to expand. *Filartiga*, 630 F.2d at 881 ("It is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.").[12] The Ninth Circuit has cited approvingly to *Filartiga* on a number of occasions. If the Ninth Circuit continues to look to *Filartiga* for guidance, then a ruling from this Court that there is no right of action under the ATS may have limited impact. Even in the absence of a right of action under the ATS, the Ninth Circuit may be inclined to reach the same result by implying a right of action under federal common law -- the very approach suggested by the Second Circuit. *Filartiga,* 630 F.2d at 887.

Review is warranted on this issue both because the contemporary evidence suggests that Congress embraced a more limited view of the jurisdiction created by the ATS and because the Second Circuit has adopted an extremely outdated view of federal common law. Contrary to the holding of *Filartiga,* there is not a self-executing "common law of the

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[12] If customary international law really is part of "the common law of the United States," and is enforced pursuant to an implied right of action, it is difficult to understand what continued relevance the ATS plays in the jurisdiction of the federal courts. Now that Congress has granted the federal courts general federal question jurisdiction (28 U.S.C. § 1331), courts would automatically possess jurisdiction over customary international law under § 1331 the moment it was determined that customary international law is part of the federal common law.

United States," pursuant to which the federal courts may create and enforce private rights of action for torts alleged to violate the norms of customary international human rights law. The Second Circuit's holding in *Filartiga* was premised on that court's misreading of several nineteenth-century cases that applied "general federal common law" to transitory common-law claims in a manner that was repudiated by this Court in *Erie Railroad Co. v. Tompkins,* 304 U.S. 78 (1938).

Filartiga's claim that international law is part of "the common law of the United States" and therefore "aris[es] under . . . the Laws of the United States," 630 F.2d at 885-87, conflicts with the long-standing and repeated assertions of the Court that international law that has not been codified in a statute or an enforceable treaty does not present a federal question or arise under federal law. *See, e.g., N.Y. Life Ins. Co. v. Hendren,* 92 U.S. 286, 286-87 (1875) (the Court lacks jurisdiction to review "the law of nations applicable to this case" because that law does not involve "the constitution, laws, treaties, or executive proclamations, of the United States," and therefore does not present any Federal question"); *Ker v. Illinois,* 119 U.S. 436, 444 (1886) (claim of international law violation raises no federal question and "the decision of that question is . . . within the province of the State court, as a question of common law"); *Huntington v. Attrill,* 146 U.S. 657, 683 (1892) (noting that if a "question of international law" is decided in state court, "the Constitution and laws of the United States have not authorized" Supreme Court review of the decision). These cases make clear that before *Erie* (which held that "[t]here is no federal general common law," 304 U.S. at 78), international law (like the law of torts and contracts) had been deemed a part of the federal general common law, which, though not itself raising a federal question, provided the rule of decision for federal courts that otherwise had jurisdiction over a case. *See Huntington,* 146 U.S. at 683 (explaining that

although international law is not federal law, if a "question of international law" arises in federal court, "it is one of those questions of general jurisprudence which the court must decide for itself").

The Second Circuit thus erred by taking out of context this Court's pre-*Erie* statements that international law "is part of our law" and "part of the law of the land." *Filartiga,* 630 F.2d at 887 (quoting *The Nereide,* 13 U.S. (9 Cranch) 388, 422 (1815), and *The Paquete Habana*, 175 U.S. 677, 700 (1900)). Pronouncement about the law of nations, "our law," and "the law of the land" in the pre-*Erie* cases on which *Filartiga* relied involved an application of this older form of general common law and simply had no bearing on the actual question presented in *Filartiga, i.e.,* whether claims for torts in violation of uncodified customary international law arise under federal law. *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position,* 110 HARV. L. REV. 815 (1997).

In sum, because of serious flaws in both approaches employed by federal appeals courts to arrive at the conclusion that there exists a body of human rights tort law enforceable by private plaintiffs in the federal courts against both government officials and private actors, the Court should grant review on this issue.

CONCLUSION

Amici curiae Washington Legal Foundation, the National Fraternal Order of Police, and the Allied Educational Foundation respectfully request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

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